No. 275

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Supreme Court of the United States

For the Second Circuit.

October Term, 1955.

IN THE MATTER OF THE APPLICATION
OF
CARMELLA ORLANDO for a Writ of Habeas Corpus, to inquire into the detention of Frank or Francesco Orlando, by the District Director of Immigration and Naturalization, or his deputies at Syracuse, New York.

FRANK ORLANDO,
Relator-Appellant,

against

DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION,
Respondent-Appellee.

Petition for Writ of Certiorari to the United States Court of Appeals.

LAURENCE SOVIK,
Attorney for Petitioner,
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Syracuse 2, N. Y.

SMITH AND SOVIK,
Of Counsel,
300 Wilson Building,
Syracuse 2, N. Y.

THE REPORTER COMPANY, INC., Walton, N. Y.—1955

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In the

Supreme Court of the United States

October Term, 1955

In the Matter

of

The Application of Carmella Orlando for a Writ of Habeas Corpus, to inquire into the detention of Frank or Francesco Orlando, by the District Director of Immigration and Naturalization, or his deputies at Syracuse, New York.

Frank Orlando,
Relator-Appellant,

against

District Director of Immigration and Naturalization,
Respondent-Appellee.

Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

To the Honorable Chief Justice and Associate Justices of The Supreme Court of the United States:

Laurence Sovik, Esq., on behalf of petitioners Carmella Orlando and Frank Orlando, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above entitled action on the 2nd day of May, 1955.

Opinions Below.

The opinion of the Circuit Court of Appeals was reported in 222 F. 2d 537. The opinion of the District Court and the opinions of the Board of Immigration Appeals and the Special Inquiry Officer, which were not officially reported, are set forth in the appendix hereto annexed.

Jurisdiction.

The judgment sought to be reviewed is dated May 2, 1955, and was entered the same date in the office of the Clerk of the Court of Appeals for the Second Circuit. Jurisdiction is invoked under Section 1254 (1) of the Judicial Code, 28 U. S. C. A. Sec. 1254 (Act June 25, 1948, c. 646, 62 Stat. 928).

Questions Presented.

1. May the Special Inquiry Officer of the Immigration and Naturalization Service, before whom hearing is being held, withhold from the alien or his attorney a portion of the administration file, and then make that portion a part of the record upon which his decision is based and include that portion of the file as a part of the certified record on appeal to the Board of Immigration Appeals?

2. May the Board of Immigration Appeals consider "extensive confidential information" in exercising administrative discretion with respect to an application for suspension of deportation without disclosure of such information to the alien where no determination has been made by the Board that such disclosure would be prejudicial to the public interest, safety or security?

Statutes Involved.

IMMIGRATION AND NATURALIZATION ACT, CHAPTER 12 (8 U. S. C. A. 1254):

"(a) As hereinafter prescribed in this Section, the Attorney General may, in his discretion, suspend deportation and adjust the status to that of an alien lawfully admitted for permanent residence, in the case of an alien who—

"(1) applies to the Attorney General within five years after the effective date of this chapter for suspension of deportation; last entered the United States more than two years prior to June 27, 1952; is deportable under any law of the United States and is not a member of a class of aliens whose deportation could not have been suspended by reason of section 19 (d) of the Immigration Act of 1917, as amended; and has been physically present in the United States for a continuous period of not less than seven years immediately preceding the date of such application, and proves that during all of such period he was and is a person of good moral character; and is a person whose deportation would, in the opinion of the Attorney General, result in exceptional and extremely unusual hardship to the alien or to his spouse, parent or child, who is a citizen or an alien lawfully admitted for permanent residence;"

CODE OF FEDERAL REGULATIONS (8 C. F. R. 242.54)

"Contents of Record; Evidence—

"(a) *Record*

"The testimony, and exhibits, the decision of the Special Inquiry Officer and all written motions and other papers and requests filed in the proceeding, shall constitute the record in the case."

CODE OF FEDERAL REGULATIONS (8 C. F. R. 244.3)

"Use of confidential information--in the case of an alien qualified for voluntary deportation or suspension of deportation under Section 242 or 244 of the Immigration and Nationality Act the determination as to whether the application for voluntary deportation or suspension of deportation shall be granted or denied (whether such determination is made initially or on appeal) may be predicated upon confidential information without the disclosure thereof to the applicant, if in the opinion of the officer or the Board making the determination the disclosure of such information would be prejudicial to the public interest, safety or security."

Facts.

On September 23, 1953, petitioner was arrested on a charge of entering the United States as a stowaway on or about the 12th day of April, 1924. At the hearing of October 21, 1953, he conceded that he was in the country illegally and made due application for suspension of deportation under Section 1254 of the Immigration and Nationality Act. On December 22, 1953, the Special Inquiry Officer determined that the alien was deportable and denied his application for suspension of deportation. Appeal was made to the Board of Immigration Appeals and on July 19, 1954, the said Board of Immigration dismissed the appeal. In the appeal to the Board of Immigration the petitioner stressed the fact that, first of all he was statutorily eligible for discretionary relief despite the finding of the Special Inquiry Officer to the contrary; that improper standards of arriving at statutory eligibility had been applied and that therefore no proper exercise of discretion with respect to the alien's application for suspension of deportation could be exercised.

The Board of Immigration Appeals, without specifically stating that it was setting aside the Special Inquiry Officer's finding of statutory ineligibility, proceeded to make a determination that the alien's case "does not measure up to the standards we require for a grant of suspension of deportation." The Board of Immigration Appeals made use of administrative files to which the alien was not given access although demand was made at the proper time at the hearing; and in addition thereto the Board of Immigration Appeals came to its conclusions in part based upon "extensive confidential information" which was not disclosed to the alien. No determination was made by the Board of Immigration Appeals that the "extensive confidential information" was of such a nature that its disclosure would be "prejudicial to the public interest, safety or security."

Upon the arrest of Frank Orlando, after the dismissal of the appeal, an application for a writ of habeas corpus was made before the Honorable Stephen W. Brennan, United States District Judge in and for the Northern District of New York, and after due hearing before the said Judge Brennan, the writ was dismissed. An appeal was then made to the United States Court of Appeals for the Second Circuit based upon the improper use of prior statements and affidavits of Orlando, the petitioner, without making them a part of the record and upon the further grounds that the Immigration and Naturalization Service did not comply with the restrictions imposed under 8 C. F. R. 244.3 in the use of confidential information. On May 2nd, 1955, the decision of the Honorable Stephen W. Brennan was affirmed by the United States Court of Appeals and judgment was answered accordingly on that date.

The prior statements and affidavits of the petitioner Frank Orlando related to applications to validate his

entry either under his own name or under the name of Frank Abate, the details of which are contained in the certified record on appeal. The matter of the confidential information is unknown to the petitioner.

Argument.

The Second Circuit has decided a Federal question in a way in conflict with the applicable decisions of this Court.

I. The record prepared for use before the Board of Immigration Appeals should not have included any items not properly made part of the record. The Second Circuit has by its decision in effect nullified the requirements set up under the most recent rules and regulations of the Immigration and Nationality Act. 8 C. F. R. 242.54 with respect to contents of the record reads as follows:

> "evidence—(a) *Record.*
>
> "The testimony, the exhibits, the decision of the Special Inquiry Officer, and all written motions and all other papers and requests filed in the proceedings, shall constitute the record in the case."

Subsection B of Section 242.54 makes it the duty of the Special Inquiry Officer to enter of record any statement which is material and relevant to any issue in the case previously made by the alien. No provision is made for that duty to be substituted by or delegated to any other officer or Board. The purpose of course of making it the responsibility of the Special Inquiry Officer is evident by the final sentence of Subsection b which refers to objections to be made by the alien of his counsel.

The effect of this violation of the plainly stated rules and regulations made it impossible for the alien, Frank

Orlando, to properly meet the inferences and accusations contained in the administrative file (and it is not suggested that this portion of the administrative file contains confidential information).

In conflict with the decision of the United States Court of Appeals in the instant case, the Supreme Court in *Ohio Bell Telephone Company v. Commission,* 301 U. S. 292, reversed a judgment of the Supreme Court of Ohio which had affirmed an order of the State Public Utility Commission requiring refunds by the Telephone Company; the Commission's order had been based on valuation data in the files of the Commission but never disclosed to the company. The Court observed that the company "had no opportunity to examine them, to analyze them, to explain and to rebut them * * * this is not the fair hearing essential to due process." The Supreme Court in *Simmons v. United States,* 99 U. S. 339 (Lawyers' Edition), reversed a judgment of the Ninth Circuit in which a selective service registrant was not supplied by the Hearing Officer with a full summary of adverse evidence contained in an F. B. I. report.

II. The Board of Immigration Appeals cannot consider "extensive confidential information" in exercising administrative discretion with respect to an application for a suspension of a deportation without disclosure of such information to the alien in the absence of a determination that the disclosure of the information would be prejudicial to the public interest, safety or security. Although the District Court and the United States Court of Appeals have not responded to the appellant's objection to the use of confidential information without the safeguards required under 8 C. F. R. 244.3, it is evident that a violation of the plainly stated restrictions of that section has occurred.

Prior to the rules that were in effect at the time of the hearing and of the appeal, it was a moot point as to whether or not confidential information could be used against the interest of the alien seeking relief. Any doubt as to the use of such confidential information was set aside when the new rules and regulations were published. 8 C. F. R. 244.3 is clear and concise. Equally clear is the fact that the Board of Immigration Appeals, which employed, according to its own publication, the use of "extensive confidential information," did not comply with the requirement of 8 C. F. R. 244.3 in that no disclosure was made to the alien and no opinion of the Board was made that the "disclosure of such information would be prejudicial to the public interest, safety or security." No decision by the United States Court of Appeals has been made with respect to this new regulation. To allow such a determination to stand on the record would be not only unfair to the alien but would serve as a pattern for the other Special Inquiry Officers and the Board of Immigration Appeals to follow.

CONCLUSION.

It is therefore respectfully submitted that for the reasons above stated this petition for a writ of certiorari should be granted.

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APPENDIX.

Judgment of the Circuit Court of Appeals.

UNITED STATES COURT OF APPEALS,

FOR THE SECOND CIRCUIT.

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 2nd day of May, one thousand nine hundred and fifty-five.

Present:

HON. CHARLES E. CLARK,
Chief Judge,
HON JEROME N. FRANK,
Circuit Judge,
HON. CLARENCE G. GALSTON,
District Judge.

U. S. *ex rel.* CARMELLA ORLANDO,
Relator-Appellant,

v.

DISTRICT DIRECTOR, etc.,
Respondent-Appellee.

Appeal from the United States District Court for the Northern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Northern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

s/ A. DANIEL FUSARO
Clerk

Opinion of the Circuit Court of Appeals.

UNITED STATES COURT OF APPEALS,

FOR THE SECOND CIRCUIT.

No. 249, October Term, 1954.

Argued March 18, 1955 Decided May 2, 1955

Docket No. 23337

UNITED STATES *ex rel.* FRANK ORLANDO,
Relator-Appellant,
v.
DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION,
Respondent-Appellee.

Before CLARK, Chief Judge, FRANK, Circuit Judge, and GALSTON, District Judge.

Appeal from the United States District Court for the Northern District of New York, Stephen W. Brennan, Judge.

Frank Orlando appeals from dismissal of his writ of habeas corpus challenging the legality of the denial of his application for suspension of deportation by the Board of Immigration Appeals.

William J. Mackay, Syracuse, N. Y. (Smith & Sovik, Syracuse, N. Y., on the brief), for relator-appellant.

Herman I. Branse, Acting Dist. Counsel, Immigration and Naturalization Service, Buffalo, N. Y. (Theodore F. Bowes, U. S. Atty. for Northern Dist. of New York, Syracuse, N. Y., on the brief), for respondent-appellee.

PER CURIAM:

A majority of this court is content to affirm on the reasoned and complete opinion of District Judge Brennan. Counsel has, however, particularly pressed on us the supposed incompleteness of the record before the Examiner. These objections were not so clearly preserved in the administrative proceedings that we feel it incumbent on us to upset the obviously correct determination of the administrative tribunal, arrived at after careful evaluation of appellant's checkered history. There is no reason to suppose that what is now certified to us as the administrative record was not such or was not available to counsel at all times. This disposes of the 1939 papers, which are marked as one of the exhibits. As to the 1938 false application papers, we agree with Judge Brennan that there is good reason to believe that their nonproduction may have been waived—or so the Board might reasonably have concluded from counsel's oral argument before it. Immigration proceedings are now so harsh, as a matter of law, that perhaps the usual presumptions in favor of administrative regularity should well be mitigated somewhat to show a modicum of kindness to our hard-pressed alien visitors. Even so, we probably do no good, but may eventually prejudice other deserving cases if on the proddings of counsel's afterthoughts we search an administrative record to discover possibilities of lurking ambiguities which in any event have clearly not affected due process or the ultimate result.

FRANK, Circuit Judge, dissenting:

I dissent because of the following which Judge Brennan does not mention in his opinion. The Inquiry Officer noted that in 1934 the appellant had executed an application for a Certificate of Arrival under the name of

one who had arrived in this country under circumstances more legitimate than those whose surrounded appellant's arrival.[1] Partly on that basis, he denied the application for a suspension of deportation. Orlando, in his appeal to the Board of Immigration Appeals from the decision of the Inquiry Officer, argued, both in his brief and orally, that, in executing the false 1934 application, he was without fraudulent intent and "was victimized by someone who took advantage of the appellant's distress." The Board rejected this contention, based on evidence, contained within the files of the Immigration and Naturalization Service, that again in 1938 he falsely submitted an application under the false name, and that, in a sworn statement to the Immigration Service in 1939, upon confrontation by an Immigration and Naturalization Service inspector, he admitted the falsity of his 1938 application.

Neither the 1938 application, nor the 1939 repudiation of the application, were introduced in evidence by the Hearing Officer or shown, even informally, to the appellant or his counsel; indeed, there is no evidence that the Hearing Officer was even aware of their existence. Nor is there any evidence, in the record, of the oral proceedings before the Board, that the Board confronted appellant or his counsel with this evidence, or gave him any opportunity to explain the very harmful inferences which could be drawn from it.

I disagree with my colleagues' statements concerning these papers: As to the 1939 papers, which contain the repudiation of the earlier application, my colleagues say that it is "marked as one of the exhibits" and that "there is no reason to suppose that they were not available to counsel at all times." But the papers received their "mark as an exhibit" in 1949, five years earlier, when they were attached to the report of a Naturalization Examiner in a different proceeding. There is no mark

to suggest that at any point it was made a part of the present record. This is particularly significant since other parts of the record, which were made available to counsel, were stamped, numbered and initialed by the Hearing Officer.

My colleagues also err, I think, in saying that "as to the 1938 false application papers, we agree with Judge Brennan that there is good reason to believe that their non-production may have been waived. * * *" Judge Brennan made no such finding, nor does his decision even mention the 1938 application papers. His discussion of waiver is specifically and clearly concerned with the 1934 and the 1947 papers. Admittedly Orlando was confronted with those papers and his counsel had access to them, Judge Brennan's discussion—with which I do not take issue—relates to whether or not counsel therefore waived his right to have those papers formally introduced in evidence. That discussion has no significance with respect to the 1938 application papers which—in contrast to the 1934 and 1947 papers—were not shown to counsel at any stage in the proceedings, so far as the record shows.

I think that Orlando was entitled to know what documents constituted the record against him, to have access to those documents,[1] and to have an opportunity to rebut the inferences drawn from them. In *Ohio Bell Telephone Company v. Commission*, 301 U. S. 292, the Supreme Court reversed a judgment of the Supreme Court of Ohio which had affirmed an order of the state public utility commission requiring refunds by the telephone company; the commission's order had been based on valuation data in the files of the commission but never disclosed to the company. The Court, per Cardozo, J.,

[1] Unless "in the opinion of the Board making the determination the disclosure of such information would be prejudicial to the public interest, safety or security." 8 C.F.R. 244.3. But the government does not suggest that the papers here in question come within any such category.

wrote that the company had no "opportunity to examine them, to analyze them, to explain and to rebut them. * * * This is not the fair hearing essential to due process." More recently, the Supreme Court has reversed, without written opinion, a judgment of the Ninth Circuit, in which a Selective Service registrant was not supplied by the Hearing Officer with a full summary of adverse evidence contained in an FBI report, *Simmons v. United States,* 99 U. S. 339 (March 28, 1955), Lawyers' Edition, and another judgment of that Circuit in which the registrant was not given an opportunity by the Appeal Board to answer an adverse recommendation of the Department of Justice before receiving his final classification, *Bradley v. United States,* U. S. (March 28, 1955).

Of course, no one can say that Orlando, by testimony or other evidence, could have explained away his damaging, prior statements with sufficient persuasiveness to win a suspension of deportation from the Board. But I think he should have been afforded the opportunity to try to do so, and I would remand to find out whether that opportunity has been denied.

District Judge's Decision.

UNITED STATES DISTRICT COURT,

NORTHERN DISTRICT OF NEW YORK.

IN THE MATTER

of

The Application of CARMELLA ORLANDO, for a Writ of Habeas Corpus, to inquire into the detention of Frank or Francesco Orlando, by the District Director of Immigration and Naturalization, or his deputies at Syracuse, New York.

Habeas Corpus Hearing 8-5-54; Submitted 9-22-54; Decided 10-2-54

Hon. Theodore F. Bowes
United States Attorney
Federal Building
Syracuse, New York

Herman I. Branse of the Immigration and Naturalization Service of Counsel

Smith & Sovik
Attorneys for Petitioner
Wilson Building
Syracuse, New York

William J. Mackay of Counsel

Decision

BRENNAN, Judge:

Frank Orlando, in whose behalf a petition is filed herein, seeks relief through the medium of a writ of habeas corpus in the matter of the denial of his application for the suspension of a warrant or order for his deportation. For convenience, Orlando will be referred to as the petitioner.

The petitioner is an alien, native of Italy, who claims to have entered the United States as a stowaway in April, 1924. He has remained a resident of this country, since his entry, which has never been legally validated. That he is subject to be deported appears to be conceded and as in *United States v. Shaughnessy,* 202 F. 2d 519, the issue is narrowed to a consideration of the contention that he was denied a fair hearing in the matter of his application for suspension of deportation.

Upon the deportation hearing held October 21, 1953, application under Section 244 of the Immigration and Nationality Act was made for suspension of deportation in accordance with the procedure contemplated by 8 C. F. R. 242.54(d). Formal request for such relief was thereafter filed, an investigation was made, and the report of a special inquiry officer denying the application was filed December 22, 1953. An appeal was taken to the Board of Immigration Appeals, a brief was filed in behalf of the alien, oral argument was had before the Board, and on July 19, 1954, the application for suspension of deportation was denied and the appeal dismissed. The application for a writ of habeas corpus essentially charges that the petitioner was denied a fair hearing in the matter involved before the Special Inquiry Officer, the effects of which were carried over into the proceedings before the Board, and that petitioner was thereby

deprived of the fundamental rights of essential fairness which are his, thereby rendering the decision of the Board invalid.

Specifically it is urged that the Special Inquiry Officer and the Board of Immigration Appeals used an erroneous standard in considering the alien's eligibility for suspension of deportation, that they concluded that the alien was ineligible and discretion was not in fact exercised, that the record improperly contained writings not introduced in evidence which afford the basis for the ultimate decision and that the decision was also based upon the unwarranted use of confidential information.

In resolving the contentions the court has in mind the procedures afforded in order that the discretion authorized by the statute may be exercised, the limited extent of the court's reviewing power, and the overall requirement that meticulous care be taken that the essential standards of fairness be at all times observed in the important matter involved. That the petitioner here may invoke the discretion of the Attorney General under the provisions of Section 244 of the Immigration and Nationality Act (8 U. S. C. A. 1254) is not disputed. He must bear the burden of showing residence within the United States for seven years preceding the application, that he was and is a person of good moral character during that period and that his deportation would result in exceptional and extremely unusual hardship to him, his citizen wife or child. The powers of the Attorney General granted in the above section have been delegated in accordance with applicable statutes and regulations to a special inquiry officer whose decision is subject to review by the Board of Immigration Appeals whose decision is final (8 U. S. C. A. 1103; 8 C. F. R. 242.6, 242.6[e], 6.1[b][2], 6.1[d], [1], [2]).

Although variously expressed in reported cases the power of this Court in this proceeding is limited to de-

termining that "procedural due process" was afforded the petitioner in the proceedings which culminated in the assailed order (*United States v. Shaughnessy,* 187 F. 2d 137 at 141) and that if discretion was exercised, no abuse of same occurred (*Frangoulis v. Shaughnessy,* 210 F. 2d 572). The essential standards of fairness referred to in *Bridges v. Wixon,* 326 U. S. 135 at 154, are not violated by defects unless same lead to a denial of justice (*Marcello v. Ahrens,* 212 F. 2d 830 at 837). From the above precedents and cases cited therein, it seems clear that the court's duty here is to make an overall evaluation of the procedures used, the facts disclosed, and the decision reached with the understanding that the order is unassailable if the statutory procedures are fairly followed.

The contention that "economic detriment" was erroneously used to determine the applicant's eligibility arises from the use of the term, principally in the heading or introductory paragraphs of reports or decisions. The use of the term doubtless arises from long familiarity with the requirements of the statute as it existed prior to the passage of the present Act (1952). It is abundantly clear that the Board followed the proper standard for they specifically referred to "exceptional and extremely unusual hardship to the respondent or his family within the meaning of Section 244(a)(1) of the Immigration and Nationality Act of 1952" in their decision.

It is true that the Special Inquiry Officer concluded that the petitioner was not eligible for discretionary relief and he uses language from which it may be urged that he felt he was precluded from finding good moral character by the 1949 decision, but it is the Board's decision which is subject to scrutiny here. The Board is not required to make specific findings on that subject but they proceeded to discuss, analyze and appraise the record as a whole, giving to the petitioner in any event the benefit of the exercise of the discretion contemplated

by the statute, as plainly appears by the following language of the decision:

> "This case does not measure up to the standards we require for a grant of suspension of deportation. Respondent's fraudulent claims as to name and his fraudulent presentation of witnesses to support his alleged entry date prior to 1924, alone, would be enough to defeat his application for discretionary relief, which is a matter of privilege granted by this government." • • • "In considering a request for suspension of deportation it is proper to look at the alien's record. Upon the record alone, we must refuse to grant suspension of deportation."

The petitioner may not complain, for he received the full measure of the Board's power and the quotation from *U. S. ex rel. Shaughnessy,* 212 F. 2d 519 at 521, is appropriate:

> "On the contrary, it is abundantly clear that he has been given administrative consideration of his application on the basis of individual merit, or the lack of it, with recognition of his right to make the application. As the opinion of the Board of Appeals disclosed, its decision was an actual exercise of discretion in the light of 'respondent's own statements and other evidence of record.'"

The contention as to the improper use of confidential information may be dismissed with the statement that as the Board indicated in the language quoted above, that petitioner's fraud alone would defeat the application, it follows that the use of confidential information did not effect the ultimate decision.

The petitioner seriously urges that the use of his prior affidavits, statements and evidence together with the affi-

davits of other persons made and submitted in the matter of his application for registry in October 1947 and for certificate of arrival in March, 1934, by the Board was fundamental error and the inclusion of same in the record violates the appropriate regulations making the hearing essentially unfair. Both proceedings were referred to in the oral evidence adduced before the Special Inquiry Officer and the petitioner identified himself as the applicant therein, although one of the applications were made in the name of Frank Orlando Abate. The requested relief was denied in both cases and the pertinent facts were discussed in some detail in the Board's decision making discussion here unnecessary.

As a matter of first impression it would seem that the Board, especially in a matter involving the exercise of discretion, may take notice of the contents of the records of the Immigration Service in matters pertinent thereto. No one doubts that courts frequently exercise that prerogative under somewhat similar circumstances (*Ira S. Bushey & Sons v. W. E. Hedger Trans. Corp.*, 167 F. 2d 9 at 12). It is urged however that the question of deportation and its suspension are delegated by Congress for Administrative decision under regulations having the force of law which must be followed in order that the "fair and impartial" hearing required by 8 C. F. R. 242.53(6)(b) be afforded. The writings above referred to were not offered as exhibits or made a part of the record as contemplated by Regulation 242.54(a) and (b), but were discussed by the Board in accordance with Regulation 242.61 which requires a discussion of the evidence. (See also Regulation 244.2.)

No authorities are cited which are controlling. The latest decision found would seem to lend support to this court's first impression (*United States v. Mackey*, 115 F. Sup. 45). A close examination of the record, however, shows that any defect in the procedure adopted (if

there be one) was waived by or brought about by the petitioner himself, and his contention now is more technical than substantial.

The Special Inquiry Officer in his decision refers to the two proceedings in detail beyond that shown in the testimony which indicates that the records were considered by him. The petitioner in no way questions the propriety thereof in his notice of appeal. In fact, in the oral argument before the Board at pages four and five, petitioner's counsel makes it clear that he understood that the record of the two applications had received consideration, that he had been given opportunity to examine same, and that they were not made a part of the record before the Special Inquiry Officer. In fact, he indicates that same should have been made a part of the record and in any event did not consider that same had significance. He argues in some detail that petitioner should not be charged with unfavorable inferences by reason of the facts contained therein. On page 13 of the brief submitted on behalf of the petitioner to the Board, the application of March 1934 was discussed and a full page was devoted to minimizing the petitioner's connection therewith. The same thing occurs on page 14 of the brief with reference to the application of 1947. It would seem to follow that the use of the record now objected to was in fact recognized, acquiesced in, and encouraged by the petitioner and that he may not now complain thereof.

> "Simple fairness to those who are engaged in the task of administration and to litigants, requires as a general rule that courts should not topple over administrative decisions unless the administrative body not only has erred, but has erred against objection made at the time appropriate under its practice." (*United States v. L. A. Tucker Truck Lines, Inc.*, 344 U. S. 33 [1952].)

This is not a case where discretion was exercised upon writings or upon information concerning which the petitioner had no knowledge. It cannot be said that justice is denied where, as here, the petitioner by his own written and spoken words, freely given, has enmeshed himself in a series of frauds and contradictions. The petitioner must keep in mind that his continued residence in this country is a privilege, not a right, and that this privilege may be withdrawn at any time provided that the procedures supplied are fairly followed.

The Writ is dismissed, and, it is

So ORDERED.

STEPHEN W. BRENNAN
U. S. D. J.

Decision of the Court of Immigration Appeals.

U. S. DEPARTMENT OF JUSTICE

Immigration and Naturalization Service

Buffalo 2, N. Y.

File: E-076779 December 22, 1953

In re: Frank or Francesco Orlando alias Frank Abate alias Jimmy Adamo or James Adams alias Frank or Francesco Longo

IN DEPORTATION PROCEEDINGS

IN BEHALF OF RESPONDENT:

Mr. William J. Mackay, Attorney at Law
300 Wilson Building
Syracuse, New York

CHARGES:

Warrant: Immigration and Nationality Act: Entered without inspection Immigration and Nationality Act: Stowaway

Lodged: None

APPLICATION: Suspension of deportation—economic detriment.

DETENTION STATUS: Released under bond.

WARRANT OF ARREST SERVED: September 23, 1953.

DISCUSSION: This record relates to a 54-year-old married male, a native and citizen of Italy who testified that he last entered the United States on April 10th or 12th, 1924, as a stowaway from Palermo, Italy, on the SS "Colombo" and entered the United States surreptitiously by

evading inspection by United States Immigration Officers, at which time he was not in possession of a valid Italian passport or other valid travel document. He has never been legally admitted to the United States for permanent residence (pp. 4, 5). The evidence of record supports the charges of deportability under the Immigration and Nationality Act stated in the warrant of arrest.

The respondent applied for discretionary relief in the form of suspension of deportation under the provisions of Section 244(a)(1) of the Immigration and Nationality Act, it being stipulated that Service Form I-256-A, when submitted, be placed into evidence as Exhibit 5. He declined to apply for the privilege of voluntary departure in the alternative (pp. 13, 14).

The record establishes that the respondent was legally married at Fulton, New York on September 25, 1929, to one Carmella Massaro, a native-born citizen of the United States (Exs. 6, 7). Neither party had been previously married. They have one daughter, born August 9, 1930, at Fulton, N. Y. (Ex. 8). His wife is not employed outside the home and is totally dependent upon him for support. The daughter is employed as a part-time office worker. The store which respondent operates is managed by his future son-in-law. He has one brother and one sister residing in the United States. The respondent is engaged in the operation of a farm. The family assets amount to about $82,500.00, which consist of three business blocks valued at about $60,000.00, upon which there are mortgages amounting to $10,000.00; a farm and equipment worth $20,000.00, upon which there is a mortgage of $2,500.00; a farm worth $1,000.00; stock in grocery business worth about $3,000.00; a frame house worth about $5,000.00; household furniture in home and in furnished apartments for rental worth about $5,000.00 and an automobile worth about $1,000.00. He has a gross annual income from his farm and business properties of about $16,000.00.

There was entered into evidence as Exhibit 2, Federal Bureau of Identification report No. 630665 in the case of one Frank Orlando or James Adamo which record the respondent stated relates to him. This report reflects that since 1930, the respondent has been arrested charged with various offenses. In 1937, he was arrested in Los Angeles, California, under the name, Frank Adamo, as a fugitive from New York State and brought to Oswego County, New York and tried on a charge of Murder. He was acquitted of this charge. He testified that he had lived in California under the name of Frank Adamo from 1935 or 1936. In 1937, he was also fined for operating a motor vehicle without an operator's license. In 1945, he was fined for two traffic violations and in 1946, he was fined for a traffic violation. In 1950, he was tried on a charge of Conspiracy to defraud the United States. He was acquitted of this charge. The record further shows that the respondent was arrested in 1921 in Alcamo, Italy, on a charge of Murder, was released without trial after being imprisoned for a period of two years and on May 8, 1929, was convicted *in absentia* in the Court of Assizes, Trapaniffer for commission of four murders and sentenced to life imprisonment. He stated that he has not been arrested for any cause since 1950.

Exhibit 3 consists of copy of despatch forwarded under date of July 26, 1940, by the American Consul at Palermo, Italy, to the Attorney General of the United States, attached to which is certified copy in the Italian language, together with translation of communication dated June 18, 1940, from the Royale Inspectorate of Emigration, Palermo, Italy, in the case of Francesco Orlando, son of Francesco Orlando and of Rosalia Longo, born at Alcamo, Italy on February 23, 1899, previously residing at Via T. Tasso N. 160, stating that the subject emigrated to Brooklyn about sixteen years ago and that the records of the office of the police at Trapani show that the subject is

wanted by the Police because he was condemned while absent by the Court of Assizes of Trapani to life imprisonment for having taken part in two homicides and two attempts at premeditated homicides. Also attached is a fingerprint chart and photograph of a male person. The respondent identified the photograph as one of himself and stated that the record relates to him (pp. 7, 8).

Exhibit 4 is a copy of Foreign Service Operations Memorandum, No. OMV 243, dated March 23, 1951, addressed to the Department of State from the American Consul General, Palermo, Italy, attached to which is copy of Penal Certificate, Tribunal of Trapani, dated January 31, 1951, together with translation, showing that one Francesco Orlando, son of Francesco and Rosalia Longo, born February 23, 1899, at Alcamo, Province of Trapani, was sentenced on May 8, 1928, in the Court of Assizes of Trapani to life imprisonment and permanent suspension from all public and legal offices for the commission of four murders. The respondent stated that this record relates to him. A birth certificate of the respondent attached to Exhibit 4 is being retained in the Service file with permission of the respondent. In connection with his arrest and conviction in Italy, as indicated by Exhibits 2, 3 and 4, the respondent stated that after having been held in prison for about 18 months he was released without trial; that he left Italy about a month and a half later and claims he never received notice as to his trial. As it has been held that convictions *in absentia* will not support a charge of deportability alleging conviction of a crime prior to entry, additional charges on the basis thereof were not urged.

There is no evidence that the respondent has ever been a member of any subversive groups. He has been registered under the Alien Registration Act of 1940 and assigned No. 3578045. He registered as an alien of Enemy Nationality on February 13, 1942. He stated that

he registered under the Selective Training and Service Act of 1940, and also registered as an alien under the Immigration and Nationality Act. He has submitted the affidavits of four persons who attest as to his good moral character since 1937 (Exhibits 9 and 10). A report of an independent character investigation, conducted by this Service, was stipulated into evidence as Exhibit 11. There is attached to this report sworn statement made by the respondent's wife before an officer of this Service on November 12, 1953, at Fulton, New York, also statements concerning the value and income derived from parcels of real estate recorded individually in the names of the respondent and his wife, Carmella. This report indicates that the respondent has conducted himself as a person of good moral character for the past seven years. In considering the degree of hardship which might be inflicted upon his wife if the respondent's deportation was effected, it will be noted that when questioned about his assets, the respondent stated that together, with other assets and real estate, he owned three business blocks located at 205, 207 and 214-16 Oneida Street, Fulton, New York, valued at about $20,000.00 each, upon which there were mortgages to the amount of $10,000. However, statements attached to Exhibit 11 indicate that the above parcels of real estate located at 205-7 and 214-16 Oneida Street are actually owned by Carmella Orlando and are mortgaged only to the extent of about $4,800.00. It is further shown that Mrs. Orlando derives an annual income of about $6,184.00 from these properties.

The respondent also testified that he owns a house at 33 South 7th Street, Fulton, New York, valued at about $5,000. Exhibit 11 shows that this property is also owned by Mrs. Orlando and that she receives an annual income of $1,140.00 from same. He also testified that he was the owner of the farm of 89 acres worth about $20,000.00

which he operates. He stated that this farm is mortgaged to the extent of $2,500.00. Exhibit 11 indicates that is a farm consisting of 82 1/2 acres located at Hannibal, Owego County, New York, which is also owned by Mrs. Orlando and that she receives rentals from the two-family dwelling to the amount of $1,270 a year. From the foregoing it appears that the respondent's wife is the owner of real estate which he estimates to be worth about $65,000.00, which is mortgaged to the amount of about $7,300.00, and from which she derives an annual income of about $8,500.00. In view of the foregoing it is concluded that the respondent's deportation would not result in exceptional and extremely unusual hardship to his citizen wife as contemplated under Section 244(a)(1) of the Immigration and Nationality Act.

The period of seven years good moral character to be established in connection with the respondent's application for discretionary relief extends from October, 1946, to October, 1953. As herein indicated, it has been adjudicated by the Commissioner in his order dated September 27, 1949, that the respondent was unable to establish good moral character for the five years preceding October 14, 1947, it cannot now be found that he has been a person of good moral character since October, 1946.

Further, it has been held that although a deportable alien may establish statutory eligibility for discretionary relief, he is not entitled thereto as a matter of right. *Sleddins v. Shaughnessy,* 177 F. (2d) 363 (C.C.A. 3, 1949); *U. S. ex rel. Bartach v. Watkins,* 175 F. (2d) 245 (C.C.A. 2, 1949). The grant or refusal of discretionary relief rests with the Attorney General. Exercise of that discretion requires consideration of the facts and circumstances in a particular case.

In connection with his use of the name Frank Abate, the respondent testified that he applied for citizenship and signed the name Frank Abate to the application.

Upon being shown Service Form A-2213, Application for Certificate of Arrival executed by one Frank Abate and received by this Service on March 7, 1934, stating that the applicant, Frank Abate, arrived in the United States at New York, N. Y., on September 21, 1921 on the S.S. "San Georgio," which application bears the signature Frank Orlando Abate, the respondent stated that he submitted this application and that the signature Frank Orlando Abate, appearing thereon was affixed by him. The record shows that arrival of the individual, Francesco Abate, as above shown, was verified.

The record shows that an application for Registry, submitted by the respondent upon which hearing was held at Syracuse, New York, on October 14, 1947, was denied by order of the Assistant Commissioner, dated September 27, 1949 on the ground that he failed to establish that he entered the United States prior to July 1, 1924 and also for the reason that he failed to establish good moral character for the prescribed period of five years prior to October 14, 1947.

The respondent's criminal record in Italy establishes that he was convicted on May 8, 1928, *in absentia*, of four offenses of Murder committed prior to his claimed entry into the United States. He was placed on trial in Oswego County, New York in 1937 on a charge of Murder, of which he was acquitted. He was also placed on trial in Oswego County, New York in 1950 on a charge of Conspiracy to defraud the United States, violation of Section 37 U.S.C.C., of which he was acquitted. In addition he has also been arrested in the United States on several occasions on minor charges. It is further shown that the respondent in 1934 attempted to fraudulently establish a legal residence, as a basis for naturalization, by submitting an application under the name of one Frank Abate, who was admitted for permanent residence at New York, N. Y., on September 21, 1921.

Full consideration of all the evidence and attending circumstances can only lead to the conclusion that this respondent is not eligible for discretionary relief under the provisions of Section 244 of the Immigration and Nationality Act. Therefore, his deportation will be ordered. He declined to state to what country he desired to be sent, if ordered deported.

FINDINGS OF FACT

Upon the basis of all the evidence presented, it is found:

(1) That the respondent is an alien, a native and citizen of Italy;

(2) That the respondent claims that his only entry into the United States occurred on April 10 or 12, 1924, when he arrived at New York as a stowaway on the SS "Colombo" and gained entry surreptitiously by evading inspection by United States Immigration officials, at which time he was not in possession of an unexpired Italian passport or other travel document in lieu thereof;

(3) That the respondent has never been legally admitted to the United States for permanent residence.

CONCLUSIONS OF LAW

Upon the basis of the foregoing findings of fact, it is concluded:

(1) That under Section 241(a)(2) of the Immigration and Nationality Act, the respondent is subject to deportation, in that, he entered the United States without inspection.

(2) That under Section 241(a)(1) of the Immigration and Nationality Act the respondent is subject to deportation, in that, at time of entry he was within one or more of the classes of aliens excludable by the law existing at the time of such entry, to wit, a stowaway under Section 3 of the Act of February 5, 1917.

ORDER

IT IS ORDERED that the application for suspension of deportation be denied.

IT IS FURTHER ORDERED that the alien be deported from the United States in the manner provided by law on the charges contained in the warrant of arrest.

ARTHUR J. LOVELAND
Special Inquiry Officer

AJL/dms

Decision of the Hearing Office.

UNITED STATES DEPARTMENT OF JUSTICE

Board of Immigration Appeals

Jul 19 1954

File: E-076779—Buffalo (0704-K-714) (A-3578045)

In re: FRANK or FRANCESCO ORLANDO alias FRANK ABATE alias JIMMY ADAMO or JAMES ADAMS alias FRANK or FRANCESCO LONGO

IN DEPORTATION PROCEEDINGS

IN BEHALF OF RESPONDENT: William J. Mackay, Esquire
300 Wilson Building
Syracuse 2, New York
(Heard: March 11, 1954)

CHARGES:

Warrant: Immigration and Nationality Act—Entered without inspection
Immigration and Nationality Act—Stowaway

Lodged None

APPLICATION: Suspension of deportation—economic detriment

DETENTION STATUS: Released under bond

Respondent is 54 years old, a native and citizen of Italy, who now claims to have entered the United States in April 1924 as a stowaway from Palermo, Italy. He has never been legally admitted to the United States for permanent residence. Deportability is conceded. He has never departed from the United States since his first entry.

Respondent has applied for discretionary relief in the form of Suspension of deportation on the ground that his deportation would result in exceptional and extremely unusual hardship to the alien, his United States citizen wife and daughter. His daughter is adult, 24 years old, engaged to be married, and employed. The record establishes that respondent and his wife have extensive real estate holdings, both in business and residential properties. His wife testified that she would have great difficulty operating their business interests alone, in the event that respondent were deported. The special inquiry officer denied respondent's application for suspension of deportation because he found, first, that respondent's deportation would not result in exceptional and extremely unusual hardship to respondent or his family within the meaning of Section 244(a)(1) of the Immigration and Nationality Act of 1952 and, second, that respondent had not established that he has been a person of good moral character since October 1946. The special inquiry officer found that there is no evidence that respondent has ever been a member of any subversive groups. He has registered under the necessary registrations between 1940 and 1953.

With regard to respondent's criminal record, he has actually been convicted for approximately four traffic violations. However, in disposing of respondent's request for suspension of deportation there are other elements which must be considered. Counsel contends that it is improper to take into consideration prosecutions for alleged crimes of which respondent was acquitted. Counsel contends further that the alien has been a victim of racketeers, false prosecutions, political persecution, and just plain misinformation since he was first thrown in jail in Italy at the age of 22 more than 30 years ago.

A careful study and review of the entire record reveals that it is full of instances in which this alien has demonstrated continuing disingenuousness in dealing with the im-

migration authorities. In explanation of his many misrepresentations and false claims and allegations, respondent merely has explained on several occasions that he had been advised to so testify by any one of the several attorneys he has had from time to time.

In 1938 respondent attempted to establish a legal residence in the United States in order to obtain his United States citizenship by submitting an application under the name of "Frank Abate." There is a record of admission for permanent residence of such a person at the port of New York on September 21, 1921. Respondent admits that he submitted an application, signing the name of Frank Orlando Abate. On May 2, 1939 respondent made another statement before the same examiner in which he admitted that his claim of legal entry into the United States in 1921 under the name of Frank Abate was a false statement. With regard to counsel's representation that respondent's false application made under an assumed name was not "fraudulently made so far as Frank Orlando is concerned," we have only to refer to respondent's question and answer statement of February 16, 1938, Exhibit L, in which he clearly attempted to claim this false identity and the 1921 entry, both of which claims were abandoned when their falsity was exposed by a representative of the Immigration and Naturalization Service.

Respondent then attempted to establish his residence in the United States from prior to July 1, 1924 by claiming entrance into the United States in April 1924. He had no documentary evidence to establish the date of his entry, but presented affidavits from witnesses to testify to his residence from the claimed date. The record contains a sworn statement taken at the Immigration and Naturalization Service office in New York from one of respondent's affiants who had signed a deposition claiming to have met him first in this country in May 1924. When questioned by an examiner, that affiant stated that he recognized his

signature at the bottom of the affidavit, but that he had never seen respondent in his life. He was shown several photographs of respondent, but stated that he did not know him or remember him, that he had never read the affidavit before, and he did not know how his signature came to appear upon it. Another of respondent's witnesses made a similar statement, executing a sworn affidavit in the matter of respondent's application, stating that, while he had signed the affidavit which stated that he had known respondent for 14 years and had met him in April 1924, that, in fact, he does not recognize the photograph of respondent, nor does he recall having ever seen this man. He had no recollection of the circumstances under which he signed the affidavit. The Service examiner stated, on January 22, 1948, that of the 13 additional witnesses nominated by the applicant, five witnesses made an actual appearance at the office where their testimony was heard and reduced to affidavit form, and seven either mailed in their affidavits, or professed to have other commitments or could not be located. One witness had moved and left no address, and another witness never responded to requests of the Immigration Service that he appear to testify in this matter. Respondent's application was denied on September 27, 1949 by the Assistant Commissioner of the Immigration and Naturalization Service on the ground that he had not established his residence in the United States prior to July 1, 1924. It was further stated that he had not established that he is a person of good moral character.

With regard to the date of respondent's entry into the United States, the record indicates that the Emigration Office for the Province of Trapani stated, "According to the information furnished on February 2, 1940 by the Carabinieri of Alcamo, Orlando apparently left clandestinely for the United States in 1928."

The record establishes that respondent was convicted in Italy on May 8, 1928, *in absentia*, of two offenses of mur-

der and as an accomplice in two murders, committed prior to his claimed entry into the United States. Counsel stated in oral argument that the reason that respondent was charged with complicity in these four serious crimes was that he was the "son of a councilman who was violently opposed in his politics to Mussolini, and that he was one of many who had been arrested at that particular time and thrown into jail." This is the first time this explanation has appeared in the record. Furthermore, the respondent now claims that he did not know of these convictions until he was informed of them by the status examiner for the Immigration and Naturalization Service. Since he still has seven brothers and sisters living in Alcamo, his home city, and a brother and sister living in the United States with whom he corresponds, it is hardly reasonable to believe that he had never before heard of his convictions.

On February 29, 1952 respondent declared to an immigration inspector that the only time he was arrested in Alcamo, Italy, was when he was 18 years old, "for fighting." He was asked what happened and stated that the charge was dismissed. He was asked when was his next arrest, and he stated that it was in Fulton, New York, in 1931 or 1932 for murder, 1st degree. When he was confronted with his 1948 statement in which he admitted that he had been arrested on Suspicion of murder, he admitted that that was the same arrest that he had described in his 1952 statement as an arrest for "fighting."

With regard to respondent's conviction *in absentia* in Italy, as was stated by the hearing officer, it has been held on many occasions by this Board that convictions *in absentia* in Italy are not binding convictions under our law, and therefore will not support a charge of deportability for conviction of a crime prior to entry.

The record further indicates that some delay was encountered by the Immigration Service in obtaining respondent's police record from abroad "because of his

reluctance to sign a certificate for the release of information concerning him by the authorities in Italy." He stated that he had requested that the court documents be forwarded directly to him, that he would contact the Service when he received the documents, but he would not sign a certificate requesting that the record of conviction be forwarded directly to the Service.

The record shows that in 1937 respondent was arrested in Los Angeles, California, where for two years he was a fugitive from justice, living under an assumed name. He was returned to New York and tried on a charge of murder, for which he was acquitted.

On July 10, 1950 respondent was prosecuted on a charge of conspiracy to defraud the United States, and he was acquitted.

This case does not measure up to the standards we require for a grant of suspension of deportation. Respondent's fraudulent claims as to name and his fraudulent presentation of witnesses to support his alleged entry date prior to 1924, alone, would be enough to defeat his application for discretionary relief, which is a matter of privilege granted by this government. It has been necessary for the United States Government to spend considerable money and effort in investigating respondent's false claims both in the United States and abroad, and in apprehending him as a fugitive. In considering a request for suspension of deportation it is proper to look at the alien's entire record. Upon the record alone, we must refuse to grant suspension of deportation.

In addition, there is extensive confidential information to corroborate our finding that respondent's is not a case to be sent to Congress with the request for suspension. We do not consider confidential information when determining an issue of deportability, but it is proper to use confidential information in considering the issue of discretionary relief. The use of such information for this limited pur-

pose is sanctioned by 8 C.F.R. 244.3. *Matter of O.*, E-057357 (October 21, 1953), Int. Dec. 519.

Respondent refused to state to what country he desired to be sent, if he is deported. He has declared that he fears to be deported to Italy, on the ground that he might be persecuted for political reasons. The country to which an alien is deported is not within the jurisdiction of this Board. An alien is entitled to be heard on the subject of political prosecution before the Commissioner of the Immigration and Naturalization Service.

ORDER: It is ordered that the application for suspension of deportation be denied.

IT IS FURTHER ORDERED that the appeal be dismissed.

Acting Chairman

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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 275

UNITED STATES EX REL. FRANK ORLANDO, PETITIONER

v.

DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The *per curiam* opinion of the Court of Appeals (Pet. 3a-7a) is reported at 222 F. 2d 537. The opinion of the District Court (Pet. 8a-15a, App. 4-11, R. 209-215)[1] has not been reported.

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[1] Petitioner filed with this Court the printed appendix in the court below, which is here designated as "App.". The respondent has had certified and is filing with this Court the entire record before the court below, which includes the administrative record. That record is designated as "R.".

JURISDICTION

The judgment of the Court of Appeals was entered on May 2, 1955 (Pet. 1a-2a). The petition for a writ of certiorari was filed July 29, 1955. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in denying petitioner's application for a suspension of deportation, the Board of Immigration Appeals committed reversible error in considering evidence now alleged by petitioner not to be in the record before the Board.

STATUTE AND REGULATIONS INVOLVED

Section 244 of the Immigration and Nationality Act of June 27, 1952 (66 Stat. 163, 214; 8 U.S.C. 1254) provides in relevant part:

> (a) As hereinafter prescribed in this section, the Attorney General may, in his discretion, suspend deportation and adjust the status to that of an alien lawfully admitted for permanent residence, in the case of an alien who—
>
> (1) applies to the Attorney General within five years after the effective date of this chapter for suspension of deportation; last entered the United States more than two years prior to the date of enactment of this Act; is deportable under any law of the United States and is not a member of a class of aliens whose deportation could not have been suspended by reason of section 19(d) of the Immigration Act of 1917, as amended; and has

been physically present in the United States for a continuous period of not less than seven years immediately preceding the date of such application, and proves that during all of such period he was and is a person of good moral character; and is a person whose deportation would, in the opinion of the Attorney General, result in exceptional and extremely unusual hardship to the alien or to his spouse, parent or child, who is a citizen or an alien lawfully admitted for permanent residence; or

* * * * *

8 C.F.R. 242.54 provides in relevant part:

(a) *Record.* The testimony, the exhibits, the decision of the special inquiry officer, and all written motions and other papers and requests filed in the proceeding, shall constitute the record in the case.

(b) *Use of prior statements.* The special inquiry officer may enter of record any statement, oral or written, which is material and relevant to any issue in the case, previously made by the respondent or any other person during any investigation, examination, or hearing. If objection thereto is made by the alien or his counsel or representative, the reasons for the objection, as well as the ruling thereon by the special inquiry officer, shall be made a part of the record.

8 C.F.R. 244.3 provides in relevant part:

> *Use of confidential information.* In the case of an alien qualified for * * * suspension of deportation * * * the determination as to whether the * * * suspension of deportation shall be granted or denied (whether such determination is made initially or on appeal) may be predicated upon confidential information without the disclosure thereof to the applicant, if in the opinion of the officer or the Board making the determination the disclosure of such information would be prejudicial to the public interest, safety, or security.

STATEMENT

The petitioner, Frank Orlando, is a native of Italy who claims to have entered the United States through New York as a stowaway aboard the S.S. *Colombo* in April 1924 (App. 15, R. 4). He has remained a resident of this country since his entry but has never been admitted legally (App. 15, 44, Pet. 23a, R. 4, 43). In 1934,[2] in an attempt to establish legal residence as a basis for naturalization, petitioner submitted to immigration authorities an application for a certificate of arrival, affixing thereto the signature of "Frank Orlando Abate" and falsely stating that he had arrived in this country at New York aboard the S. S. *San*

[2] There is some indication in the record that this application may have been in 1931 rather than 1934 (R. 172, 177, 178, 186), but the actual date is not significant for present purposes.

Georgio on September 21, 1921 (App. 42, Pet. 21a-22a, R. 42, 73).[3] In 1938, in connection with an investigation by the Immigration Department, petitioner signed a sworn statement assuming that name and claiming the 1921 entry date (App. 47, Pet. 27a, R. 24, 184). In May 1939, petitioner made a statement before the same immigration examiner who had taken the 1938 statement, admitting that he arrived in this country as a stowaway in 1924 and that his claim of entry in 1921 was false (App. 47, Pet. 27a, R. 24, 177).

Petitioner next attempted, in October 1947, to establish his residence in the United States prior to July 1, 1924, by submitting an application for registry (R. 143-148), together with affidavits from witnesses allegedly verifying the residence date (App. 47, Pet. 27a, R. 25, 192, 194). At a hearing on this application, copies of affidavits and testimony taken from some of these witnesses were introduced in which they swore that they did not know petitioner and had no recollection of affixing their signatures (App. 48, Pet. 27a-28a, R. 25, 152, 191, 193, 196, 199). Also introduced at this time were copies of petitioner's 1938 statement falsely claiming the 1921 entry, and his 1939 statement admitting the falsity of the 1938 statement (R. 182-186, 171-180). In September 1949, petitioner's claim was denied by the Assistant Commissioner of

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[3] The record shows that one Francesco Abate was admitted at New York for permanent residence on September 21, 1921 (App. 42, 47, R. 42, 24).

Immigration who, after considering the fact that petitioner had no documentary evidence of his entry in the United States antedating 1927, the inability of some witnesses to identify petitioner and the incredibility of others, and petitioner's record of criminal arrests, held that petitioner had failed to establish both his entry prior to July 1, 1924, and his good moral character for the prescribed period of five years prior to October 1947 (App. 42, Pet. 22a, R. 42, 138-139).

In September 1953, deportation proceedings were commenced against petitioner on the ground that he had entered the country without inspection as a stowaway (App. 36, Pet. 16a, R. 39, 86). At a hearing before a special inquiry officer on October 21, 1953 (R. 71-85), counsel for petitioner made a preliminary statement to the effect that he had not had the opportunity of reviewing the prior records, and was making an application to see any petitions previously submitted to the Immigration Service by his client in order that any current applications (such as a request for a suspension of deportation) might be consistent with prior applications (R. 72). In answer to counsel's specific inquiry as to whether he would have access to the files of the Service reflecting any petitions or application made in petitioner's behalf, the special inquiry officer advised that he would have access to anything placed into evidence in the pending proceedings (R. 72).

During the hearing, petitioner was confronted

with the 1934 application for a certificate of arrival which he identified as having been signed and submitted by him (R. 73). He also was confronted with, and admitted the submission of, the 1947 application for registry. He verified the fact that he had been accorded a hearing with respect to the application but stated that he did not recall having received a copy of the 1949 order of the Assistant Commissioner which denied this application. (R. 74.) At the conclusion of petitioner's testimony, his counsel asked for and was granted additional time in which to complete and file, as part of the proceedings, formal application for suspension of deportation under Section 244 of the Immigration and Nationality Act (8 U.S.C. 1254) on the grounds that exceptional and extremely unusual hardship would result to his citizen wife (R. 83, 84). When counsel was asked if he had further evidence to present, his reply indicated that he thought, since the record reflected that an application was made by petitioner in 1947 for a certificate of registry and denied in 1949 for the reasons stated, it would not be necessary to put into evidence the documents themselves. The hearing officer agreed. (R. 84.)

Petitioner's application for a suspension of deportation was filed in December 1953. On December 22, 1953, the special inquiry officer—after reviewing evidence relative to petitioner's income and assets (App. 37, 41, Pet. 17a, 20a-21a, R. 39, 40, 41), his arrest and criminal record (App. 38-39,

Pet. 18a-20a, R. 40), his false claim made in 1934 in connection with his application for citizenship (App. 42, Pet. 21a-22a, R. 42), and the Commissioner's 1949 adjudication with regard to petitioner's 1947 claim (App. 42, Pet. 22a, R. 42)—found him ineligible for relief and ordered him deported (App. 43, Pet. 23a, R. 43).

Before the Board of Immigration Appeals, petitioner argued both in his brief (R. 58, 59) and orally (R. 32) that he did not act fraudulently in filing the 1934 application but rather was the victim of some unscrupulous person who offered to validate his stay. He argued that the 1947 application was so haphazardly and inefficiently prepared by his representative that the denial of the application could not be taken as a reflection upon his character (R. 59). His counsel admitted that he had the opportunity of reviewing, before the special inquiry officer, the 1947 application (R. 32). The Board rejected petitioner's argument that he did not act fraudulently in filing the "1938"[4] application, making reference to the attempt by petitioner to establish the false identity and entry date in his question and answer statement of February 1938, and to his 1939 repudiation. The Board further discussed in detail the fraudulent affidavits

[4] This is clearly a typographical error. The Board obviously meant "1934" application and its opinion should have read "In 1934 respondent attempted to establish a legal residence etc." (App. 47, Pet. 27a, R. 24). Petitioner had argued that he did not act fraudulently with respect to the 1934 (and 1947) application. At no point in the record is there a reference to a "1938 application."

filed in connection with his 1947 application (App. 47, 48, Pet. 27a-28a, R. 24, 25). The Board said (App. 50-51, Pet. 30a-31a, R. 27):

> * * * Respondent's fraudulent claims as to name and his fraudulent presentation of witnesses to support his alleged entry date prior to 1924, alone, would be enough to defeat his application for discretionary relief, which is a matter of privilege granted by this government. * * * In considering a request for suspension of deportation it is proper to look at the alien's entire record. *Upon the record alone, we must refuse to grant suspension of deportation.* [Emphasis added.]
>
> In addition, there is extensive confidential information to corroborate our finding that respondent's is not a case to be sent to Congress with the request for suspension. We do not consider confidential information when determining an issue of deportability, but it is proper to use confidential information in considering the issue of discretionary relief. The use of such information for this limited purpose is sanctioned by 8 C.F.R. 244.3. *Matter of O.*, E-057357 (October 21, 1953), Int. Dec. 519.

Petitioner did not petition the Board for rehearing but filed in the District Court a petition for a writ of habeas corpus, alleging, *inter alia*, that the Board's decision was improperly based

upon writings not introduced in evidence and upon confidential information (App. 14-26; R. 3-13). The court dismissed the writ, holding that the confidential information did not affect the Board's ultimate decision and that the use of the writings objected to was acquiesced in, even encouraged, by petitioner by his explanation and arguments (App. 4-11; Pet. 9a-15a, R. 209-215).

The Court of Appeals affirmed *per curiam*, pointing out that the objections were not so clearly preserved in the administrative proceedings as to make it incumbent upon the court to upset the obviously correct determination of the Board (Pet. 4a). Circuit Judge Frank dissented (Pet. 4a-7a) on the ground that the District Court opinion, with which he did not take issue, was concerned only with the 1934 and 1947 papers and that the failure to produce the 1938 and 1939 papers deprived the petitioner of a fair hearing.

ARGUMENT

1. Petitioner's contention that the Board of Immigration Appeals considered administrative documents not made a part of the record is purely a technical one. The record shows that, in the hearing before the special inquiry officer, petitioner's attention was specifically directed to the 1934 application, which he identified and admitted having filed, without objection either to the inquiry regarding it or the fact that it was not formally marked or introduced (R. 73). The same is true of the 1947 application (R. 74). The rec-

ord of the proceedings with respect to that application included the 1938 and 1939 sworn statements by petitioner,[5] as well as the fraudulent supporting affidavits referred to by the Board of Immigration Appeals (*supra*, pp. 5, 9) (R. 171, 182). Judge Frank's dissent in the court below, to the effect that it did not appear that the 1938 and 1939 statements were available to petitioner, fails to give due effect to the fact that these were all part of the record in the 1947 proceeding. Petitioner's counsel admitted in oral argument before the Board that he had had the opportunity of reviewing the 1947 application before the special inquiry officer and that it was given for "whatever information there was contained therein" (R. 32).

As District Judge Brennan held, with approval by both the majority and the dissent in the Court of Appeals, consideration of the prior applications by the Board of Immigration Appeals was acquiesced in, and encouraged by, the petitioner. He invited the attention of the Board to the applications by his explanations and protestations, both in his brief and oral argument, directed at negating fraudulent intent (R. 32, 58, 59). *Supra*, p. 8. The fact that the Board found in the record of the prior proceedings evidence that controverted peti-

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[5] Copies of these sworn statements appear in the certified record here as a part of the record of the 1949 order of the Assistant Commissioner (*supra*, pp. 5-6). As the court below pointed out, there is no reason to suppose that what is now certified as the administrative record was not such or was not available to counsel at all times.

tioner's arguments does not alter the fact that petitioner expected the prior applications to be considered. It seems clear that the whole record of the 1947 proceedings was available to petitioner. At the hearing before the special inquiry officer, after petitioner's counsel had expressed a desire to examine prior applications filed by his client, he was assured that he would have access to "anything * * * placed into evidence" at the proceedings (R. 72). There is indication that, for this purpose, he and the hearing officer regarded the documents adverted to in the testimony as being in evidence despite the fact that the documents themselves had not been formally introduced (R. 84). As noted above, petitioner made specific reference to the 1934 and 1947 applications in his brief and argument before the Board. It is also significant that, after the Board handed down its decision, relying on the 1938 and 1939 statements, which were part of the 1947 record, petitioner made no attempt before the Board to refute the accuracy of such references, and does not now deny that the statements were in fact made.

This is not a case where a failure to advise or confront a litigant with unfavorable evidence deprived him of an opportunity to explain, rebut, or defend against such evidence. The court below properly refused to "search an administrative record to discover possibilities of lurking ambiguities which in any event have clearly not affected due process or the ultimate result."

2. As the Board clearly indicated that on the basis of petitioner's fraudulent assertions alone there was sufficient reason for denying discretionary relief in the form of suspension of deportation (*supra*, p. 9), it is not necessary to reach the question of whether the Board may properly consider confidential information in denying suspension of deportation. We may add, however, that use of confidential information in suspension proceedings is explicitly authorized by regulation (*supra*, p. 4), and such use was upheld in *United States ex rel. Matranga* v. *Mackey*, 210 F. 2d 160 (C.A. 2), certiorari denied, 347 U.S. 967. The issue is discussed in the Government's brief in opposition to certiorari in the *Matranga* case (No. 663, Oct. Term, 1954), at pp. 9-11.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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SEPTEMBER 1955.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1955 999037 394